IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00870/2014

THE IMMIGRATION ACTS

Heard at Field House
On 17 February 2015

Decision & Reasons Promulgated
On 16 March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood (Senior Home Office Presenting Officer)
For the Respondent: Mr M Rudd (Counsel)

DECISION AND REASONS

1. The respondent's appeal against a decision to remove him from the United Kingdom was allowed by First-tier Tribunal Judge Flynn ("the judge") in a Decision and Reasons promulgated on 17 November 2014. The judge found that the respondent's claim to be at risk on return to Iran was not made out. She allowed the appeal on Article 8 grounds, in the light of the respondent's private and family life ties here, having taken into account the period of delay between the respondent's claim for asylum, 13 January 2007, and the decision to remove him, accompanied by reasons, on 22 January 2014.

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2. In an application for permission to appeal, the Secretary of State contended that the judge directed herself to section 117B of the 2002 Act but failed to apply the statutory provision in the correct manner. Little weight was required to be given to family or private life established by a person at a time when he is in the United Kingdom unlawfully and, similarly, little weight should be given to private life established at a time when a person is here with precarious status. The judge erred in proceeding to give little weight to the public interest in removal, in the light of the delay. The judge failed to explain why she concluded that the respondent had established family life with a girlfriend here, with whom he does not live and further erred in finding that although the respondent's circumstances were not exceptional (paragraph 78 of the decision) the long delay was exceptional and was an important factor in the balance. The respondent had made a false claim for asylum and was free to leave the United Kingdom at any time. In summary, the judge's conclusion that the public interest in removal was "small" amounted to a clear misdirection.

3. Permission to appeal was granted on 23 December 2014. In directions made by the Principal Resident Judge, the parties were advised that the forthcoming hearing would be confined to determining whether the decision of the First-tier Tribunal should be set aside for legal error.

Submissions on error of law

4. Ms Isherwood handed up a copy of the judgment of the ECHR in Y v Russia [2008] ECHR 1585. The judge found that the respondent was born in 1991, irrespective of the age assessment showing his likely year of birth as 1989.

5. Reliance was placed upon the grounds. The respondent was found not to be a credible witness in relation to his asylum case but the judge allowed the appeal on Article 8 grounds. Having been referred to section 117B of the 2002 Act, the judge did not make appropriate findings. There was a delay in dealing with the respondent's asylum claim and the main authority on this remained EB (Kosovo). Delay itself was not, however, a fundamental factor although it might lead to a person deepening ties here. The finding at paragraph 71 was flawed, in relation to family life between the respondent and his partner, LM. The couple did not live together although they wished to do so in the future. The appellant's private life ties were established while he was here precariously and the ECHR judgment in Y helped with the meaning of this phrase, at paragraphs 104 and 106 of the judgment in particular.

6. At paragraphs 76 and 78 of the decision, the judge concluded that the public interest in removal was small but delay was not expressly part of section 117B. The decision contained no reasoning regarding the extent to which the respondent had or had not integrated here or whether he was a burden on the state and other factors. The judge found that the respondent's circumstances were not exceptional and there was, overall,

nothing to show why his case succeeded. The immigration rules and case law on Article 8 showed what was required and here the judge had made an express finding that there was nothing exceptional in the respondent's circumstances.

7. Mr Rudd said that the Secretary of State disagreed with the analysis but the judge was entitled to make her findings and conclude as she did. She recorded the evidence given in detail by the respondent and LM and the conclusions reached were perfectly open to her and adequately reasoned. There was no merit in the Secretary of State's attack on the judge's approach to section 117B. The judge heard submissions on this aspect and paragraph 48 of the decision showed that she was fully aware of the Secretary of State's case here. Precariousness was relevant to the assessment of private life in particular but, so far as family life was concerned, the respondent had never been here unlawfully. His presence was lawful for so long as it took the Secretary of State to deal with his asylum claim. The decision showed that the judge was fully aware of the submissions made on the appellant's behalf and she clearly gave weight to the public interest in maintaining immigration control, as was clear from paragraphs 70, 73 and 77. The year of the respondent's birth was immaterial. The judge found that he was born in 1991 and so was 15 when he arrived but even if the earlier year of birth were taken, of 1989, he was still a minor on arrival. It took the Secretary of State seven years to decide his case. The judge was entitled to find that the appellant came here as a minor, under the direction of agents and that the delay in dealing with his case formed part of the balance. This was entirely correct. Paragraphs 74 to 79 kept the focus on family life, the determinative factor.

8. The judge was entitled to find family life even though the evidence did not show cohabitation as such, although the respondent spent part of each week with his partner. Cohabitation was not required in order to show family life. The judge took into account the written evidence and what emerged at the hearing, in cross-examination. Her summary was detailed. She gave reasons for finding that family life existed and accepted the evidence she heard.

9. The judge agreed with the Presenting Officer that the respondent's circumstances on their own were not exceptional but she properly took into account his partner's rights as well, when weighing the competing interests. Nothing in section 117B identified what particular weight was to be given to the public interest although the statute was clear that immigration control is in the public interest. The balance is for the decision maker and the Tribunal. The respondent was a minor when he came here and there was then a very long delay in dealing with his case. This was clearly a relevant factor. The only evidence bearing on section 117B(2) and (3) was what was recorded and found by the judge at paragraph 23, regarding support for the respondent from charities and his partner. On the evidence, the judge was entitled to find that the public

interest in removal was small and she was alive to the weight to be given to immigration control.

10. In response, Ms Isherwood said that the judge found the respondent's asylum claim not credible and dismissed it. She went on to allow the appeal on Article 8 grounds without properly factoring this in. She made no findings regarding precisely the extent to which the respondent was a burden on the taxpayer or regarding how he managed to support himself if not receiving support from the government, as an asylum seeker. The judge did not properly assess whether the respondent could return to Iran to get entry clearance, if family life did exist with his partner. She only made a finding that it would not be reasonable to expect LM to return to Iran with him. The reasoning at paragraph 78, for example, was insufficient.

Conclusion on error of law

11. I am grateful to the two representatives for their careful submissions. I find that the decision of the First-tier Tribunal contains no material error of law and shall stand. I gave a summary of my reasons at the conclusion of the hearing.

12. As Mr Rudd submitted, the judge made a careful summary of the evidence she heard, in the early parts of her Decision and Reasons. She set out succinctly the basis on which the respondent claimed to be at risk on return to Iran, his immigration history and the extent of the delay on the Secretary of State's part in dealing with the asylum claim and the evidence regarding family and private life ties claimed to exist here. It is clear that her reasoning builds on findings of fact made in the light of that evidence. There is a coherent structure to the decision, which is unsurprising given the experience of the judge who wrote it. Importantly, the judge recorded submissions made on behalf of each party regarding section 117B of the 2002 Act, setting out factors to be taken into account in considering the public interest question and balancing the competing interests.

13. The judge was entitled to find that family life exists between the respondent and his partner, even though the relationship was established relatively recently. There is no essential requirement that the parties cohabit. The evidence showed, in any event, that the respondent spends a substantial amount of time with his partner, spending a few days a week at her residence regularly and keeping some belongings there. Factors relevant in assessing the weight of the respondent's case included the circumstances of his partner, LM and the judge made a clear finding that the she was a credible witness. It is also clear from the decision that she accepted the respondent's evidence regarding his circumstances here, although she disbelieved his core claims regarding events in Iran.

14. The judge heard submissions on the impact of delay. As the two representatives before me accepted, the leading authority remains the

decision of the House of Lords in EB (Kosovo) [2008] UKHL 41. In essence, the House of Lords held in that case that delay is capable of weakening the state's case that a person should be removed and delay may also have the consequence that a person's ties here are deepened. The period of delay in EB (Kosovo) was less, by a considerable margin, than the delay of some seven years in dealing with the respondent's asylum claim here.

15. Having expressly taken into account section 117B of the 2002 Act, and being acutely aware of the difference in approach required in relation to private life and family life, as paragraph 73 of the decision shows (for example), the judge returned to the key task at paragraphs 74 to 79. She did not err in taking into account the long delay and reminded herself, properly, of the importance of the maintenance of effective immigration control. The judge concluded that the public interest in removal was reduced by the very long delay, to the extent that the balance was tipped in the respondent's favour and the weight to be given to his family life with LM outweighed the public interest in this case. It appears from paragraph 73 that although she gave little weight to the private life ties, she gave them some weight, nonetheless. She did not err in doing so for the reasons given in that paragraph of the decision.

16. Although other judges might have weighed the competing interests so as to reach a different conclusion, the judge in the present appeal carefully took into account the evidence before her, made clear findings of fact which were open to her, directed herself correctly in relation to the law and gave cogent reasons for concluding that the appeal fell to be allowed. No material error of law has been shown and so the decision of the First-tier Tribunal shall stand.

DECISION

17. The decision of the First-tier Tribunal shall stand.

ANONYMITY

The judge made an anonymity direction. She did so because of the relative youth and vulnerability of the respondent and LM. I maintain that direction, which shall continue in force until varied or discharged by another court or Tribunal.

Signed Date **16 March 2015**

Deputy Upper Tribunal Judge R C Campbell